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No. 02-1297

In the

Supreme Court of the United States

SIGNATURE PROPERTIES INTERNATIONAL, LIMITED PARTNERSHIP, a Delaware Limited Partnership,
Petitioner,

v.

CITY OF EDMOND, a Municipal Corporation, Oklahoma County, Oklahoma,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

REPLY BRIEF

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In its reply brief in opposition, the City has not addressed the questions presented by Signature's petition; rather, the City has attempted to re-characterize Signature's claim as a Fifth Amendment takings claim as opposed to a Fourteenth Amendment due process claim and has attempted to argue the merits of Signature's damage claim for a due process violation.[1] In so doing, the City, through its own inadvertence, has acknowledged and conceded Signature's position on the questions presented - - that being, a conflict does exist

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[1]Signature would welcome the opportunity to present and argue at a trial its evidence on damages. At the first trial, Signature presented evidence that contracts for land purchase were rescinded and canceled due to the sewer system dispute. As stated in its petition, Signature's lost profit from its Oak Tree operations exceeds Four Million Dollars. Sales were at a standstill while this case was pending. Signature is still experiencing the effect as the City has not taken any steps to repair the system and prospective purchasers want to know why the City has not repaired the system since the district court ruled that it has the responsibility to do so. In its brief in opposition, the City acknowledges that the public system as it exists requires more maintenance, making "it more costly and less desirable for the City, which planned to implement a gravity based system." Brief in Opposition, at p.2.

The City's comparison of Signature's complaint that the City's stoppage of its development caused its damage to the cries of witchery in Old Salem is nonsense. Oak Tree is one of the premier residential communities in Oklahoma. For the City to suggest that the City can completely stop Signature's development for approximately 22 months (January, 1999 through the district court's decision in mid-October 2000) without Signature suffering damages, along with the suggestion that any loss Signature suffered is the product of the vicissitudes of market forces and competition, makes one wonder who is trying to practice "witchery". Let us not forget that it was the village leadership of Old Salem that ultimately authorized and carried out the punishment (burning at the stake) suffered by the alleged witches.

among the circuit courts concerning the finality requirement for ripeness to be used when evaluating a due process claim involving restrictions on land usage and that the Tenth Circuit has misapplied the finality requirement for Signature's due process claim under this Court's decision in *Williamson County Regional Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985).

With regard to Signature's due process claim, the City does not discuss the conflict among the circuit courts, but rather cites to the Seventh Circuit's opinion in *Forseth v. Village of Sussex*, 199 F.3d 363 (7th Cir. 2000). In that decision, the Seventh Circuit refused to allow Forseth to pursue a substantive due process claim because the Seventh Circuit believes that Forseth's claim that the Village had forced him to sell a portion of his land at a discount to the Village's board president had to be analyzed as a Fifth Amendment takings claim that required Forseth to exhaust state court remedies before pursuing a claim in federal court. The Seventh Circuit interpreted this Court's decision in *Williamson County* to require exhaustion for the claim and held Forseth could not avoid the exhaustion requirement by classifying the claim as a substantive due process claim. *Id.* at 368-373.

In rendering its opinion in *Forseth*, the Seventh Circuit failed to recognize that this Court in *Williamson County* set forth a separate finality requirement for a due process violation. Exhaustion of state court remedies was not a requirement for ripeness for a due process claim. 473 U.S. at 196-200. The Seventh Circuit's decision in *Forseth* is thus in direct contradiction of this Court's decision in *Williamson County* and the decisions of other circuit courts.

As stated in Signature's petition, other circuit courts, such as the Eleventh, Eighth and Ninth Circuits, have interpreted *Williamson County* differently and have allowed a plaintiff to proceed independently on a substantive due process claim, even though the plaintiff had not exhausted state court remedies for a Fifth Amendment takings claim. *See e.g., Eide v. Sarasota County*, 908 F.2d 716, 724-27, nn.14-17 (11th Cir. 1990), *cert. denied*, 498 U.S. 1120 (1991); *Sinaloa Lake Owners Ass'n v. City of Simi Valley*, 882 F.2d 1398 (9th Cir. 1989), *cert. denied*, 494 U.S. 1016 (1990); *Bateson v. Geisse*, 857 F.2d 1300 (9th Cir. 1988); *see also McKenzie v. City of White Hall*, 112 F.3d 313 (8th Cir. 1997). Specifically, in *Eide*, the Eleventh Circuit discussed the various theories under which a plaintiff may pursue a claim against a government entity when the entity has either wrongfully taken the plaintiff's property without just compensation or has restricted the plaintiff's use of his property through an invalid exercise of police power which has the same effect as a physical taking of the plaintiff's property. 908 F.2d at 716, 720-27.

Consequently, the City's reference to the *Forseth* decision highlights and emphasizes the need for this Court to accept certiorari in this case to review and resolve the conflict among the circuit courts concerning a claim pertaining to a land use restriction that does not result in a physical takings but has the same effect as a physical takings, particularly where the restriction occurs as a result of an invalid exercise of police power, and to resolve the finality requirement for such a due process claim. As noted by the Eleventh Circuit in *Eide*, the analysis of the type of claim brought by the plaintiff and the ripeness requirement for each type of claim ***only becomes academic if the Supreme Court finally decides*** that these types of land usage claims

are properly addressed by only the just compensation clause or only the due process clause, which to date this Court has not yet finally decided. *Id.* at 721 n.8. Signature's petition gives the Court that opportunity and therefore its petition should be granted.

As pointed out in Signature's petition, Signature's property became essentially worthless during the pendency of this lawsuit because the City stopped Signature's ability to develop its property for resale to homebuilders when Signature refused to surrender to the City's demand that Signature rebuild the existing Oak Tree sewer system owned by the City. Despite the City's statements to the contrary, Signature produced evidence at trial that contracts for sale of property were rescinded and canceled because of the development ban the City imposed on Signature's property. The damages suffered by Signature did not stop with the lifting of the moratorium on the issuance of building permits for already improved lots. It took a ruling by the district court that it was the City's responsibility to rebuild or repair the sewer system in order for the City to lift the development ban on the unimproved lots and allow Signature to resume its ability to make improvements to unimproved property so that additional lots could be available for sale to prospective purchasers.

In *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), a case in which where the landowner was only granted a permit to build a beach home if he would grant an easement across his land to the public, this Court stated the building restriction was "not a valid regulation of land use 'but and an out-and-open plan of extortion.'" *Id.* at 839 (quoting other authorities). The same label can be placed on the City's actions in this case.

The City improperly used its police power to stop Signature's development in an attempt to make Signature perform the City's obligation to repair/rebuild the City's sewer system. The City did not have to take that drastic step. As stated in Signature's petition, ***the City itself could have avoided Signature's claim for damages simply by pursuing an action in court for a declaratory judgment, as Signature did, and by allowing Signature to develop while the action was pending. Instead, the City tried to use its police power to extort from Signature the money for a new public sewer.*** As discussed in *Williamson County*, this type of invalid exercise of police power violates the due process clause of the Fourteenth Amendment and the remedy for such an invalid regulation that goes too far is actual damages, and not just compensation. 473 U.S. at 196. The City made a final decision. Now the City should have to answer in damages for its wrongful conduct.

Except for the noted exception set forth in footnote 2, Signature's property has regained the market value it had before the City improperly imposed its ban on Signature's development of its property.[2] As noted by this Court in *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302 (2002), a temporary prohibition on economic use is not suited for analysis, or compensable under, the takings clause of the Fifth Amendment because the property will recover its value once the prohibition is lifted. With its property returning to the market value it had before the lawsuit once the lawsuit was determined in its favor

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[2]As previously stated, Signature still has to deal with the market effects created by the City's continued failure to take steps to repair the system.

on the declaratory relief claim, Signature does not have a remedy in state court through inverse condemnation proceedings.[3] It can only recover damages if this Court allows it to proceed with a trial on its substantive due process claim. This case demonstrates why all land use restriction cases cannot be properly analyzed as a just compensation claim.

Further, the contentions that Signature's claim should be analyzed as a due process claim and that its due process claim is ripe for review are not defeated by the assertions that the City lifted the moratorium that it imposed on the issuance of building permits for already improved lots and that Signature did not seek any building permits or did not seek a variance from the moratorium. Those arguments are merely a smoke screen. The City made a final decision to stop Signature's development unless it met the City's demands.

The moratorium on the issuance of building permits for the already developed lots was imposed after Signature filed its lawsuit seeking declaratory relief

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[3]Even though the City cries for Signature's claim to be unripe because it has not pursued inverse condemnation proceedings in state court, the City has not denied Signature's recitation of Oklahoma law that an inverse condemnation proceeding may be only pursued in an Oklahoma state court in a situation where the government has properly exercised its police power to take property but not yet paid compensation. Oklahoma inverse condemnation proceedings do not pertain to a situation where, as here, the government has abused its police power to cause actual damages. *See e.g., Curtis v. WFEC Railroad Co.*, 1 P.3d 996 (Okl. 2000); *Mattoon v. City of Norman*, 617 P.2d 1347 (Okl. 1980). This Court has never required a plaintiff to pursue a futile act. *See e.g., Palazzolo v. Rhode Island*, 533 U.S. 606 (2001).

that the City had the obligation to repair its own sewer system and seeking damages Signature would suffer for the development ban on its unimproved property. The City imposed the moratorium to further place economic pressure on Signature to surrender to its demands and dismiss its lawsuit. The moratorium was lifted after it was in place for only approximately six months because the City's own engineering expert issued an opinion that the system could service at least 225 more homes before an emergency situation existed with the capacity of the system to service the addition. Without any support for the moratorium, the City lifted the moratorium on building permits for the few already developed lots, but left the ban on Signature's right to make improvements on its larger inventory of undeveloped land in place. Signature continued to suffer economic harm from the development ban, which the City did not lift until after the district court issued its ruling that the City had the obligation to repair its own system and could not impose that burden on Signature. It took the district court's ruling to make the City lift the development ban. The finality of the City's decision was not changed by the lifting of the moratorium.[4]

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[4]For the City to now suggest that someone should have requested and sought a variance from the moratorium that would have been granted is totally false and misleading. Signature sells land. Home builders and purchasers who buy from Signature seek building permits. Evidence was produced at trial that the City denied building permits to landowners who requested permits during the moratorium. If the City would have allowed a variance, why did it impose the moratorium? It is obvious that any effort to seek a variance before the moratorium was lifted would have been a futile act. The City is attempting to play the game that this Court stated in *Palazzolo* it would not allow a government entity to play to try to avoid the consequences of a final decision.

As stated in Signature's petition, neither the district court nor the Tenth Circuit stated what remains to be determined in this case before a final decision had been reached by the City. The district court found that the City was wrong in trying to make Signature assume the City's obligation to repair the City's sewer system. The City stopped Signature's development only because Signature would not assume that burden. The City wrongfully chose the option of using its police power to try to force Signature to surrender to its demands. It could have chosen other options to determine who had the responsibility for the sewer system. The wrongful option the City chose caused Signature to be damaged. Signature should be entitled to pursue its claim for the City's violation of its due process rights. Signature's petition should be granted.

Respectfully submitted,

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